

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 19788/2021

In the matter between:

K2012150042 (SOUTH AFRICA) (PTY) LTD

Plaintiff

and

VARNADO INVESTMENTS (PTY) LTD

First Defendant

SHIREEN LEEMAN

Second Defendant

JUDGMENT DELIVERED ELECTRONICALLY ON 18 OCTOBER 2022

MANGCU-LOCKWOOD. J

A. INTRODUCTION

[1] On 8 September 2022 in Motion Court I granted the following order in this matter:

"1. That cancellation of the lease concluded between the plaintiff and first defendant on or about 28 October 2020 is hereby confirmed with effect from 1 November 2021;

2. That an order of ejectment is made against the defendant and all those

who occupy warehouses 7[...], 7[...] and 8[...] P[...] Industrial Park, Comer M[...] Drive and R[...] Road, M[...] G[...], Cape Town, through the first defendant from the said premises.

3. That the first and second defendants, jointly and severally, the one paying the other to be absolved shall make payment to the plaintiff in the sum of R9,236, 245.53;

4. That the first and second defendants, jointly and severally, the one paying the other to be absolved, make payment of interest on the aforesaid amount of R9,236, 245.53 at the rate of 2% per month from 2 November 2021 to date of payment;

5. That the defendants pay the costs of suit to date hereof and the costs of the summary judgment application on the attorney and client scale.

6. The plaintiff is entitled to pursue its claim for damages arising from the cancellation of the lease from 2 November 2021 and the defendants are granted leave to defend such claim."

[2] In addition to the above, I dismissed an application for postponement which was brought on behalf of the defendants on the day of the hearing. I hereby provide the reasons for the orders, as requested.

B. FACTS

[3] On 18 January 2022 the plaintiff delivered summons in the matter, and after notice of bar was issued against them, the defendants delivered a plea on 18 July 2022. The claim against the defendants is for arrear rentals amounting to R9 236 245,56 in respect of a commercial lease, as well as ejectment from the premises. The plaintiff also sought an order postponing a damages claim which is said to be a consequence of the lease. As against the second defendant the

claim is based on a suretyship agreement in terms of which she bound herself for the obligations of the first defendant. The plaintiff attached to the particulars of claim the written lease agreement; a reconciliation of the amounts owed in respect of the rental arrears; and a copy of the deed of suretyship.

[4] The defendants' plea admits the terms of the lease agreement and of the suretyship agreement but denies any paragraphs in the particulars of claim alleging indebtedness "as if specifically traversed" and the plaintiff is put to the proof thereof.

[5] On 5 August 2022 the plaintiff brought an application for summary judgment, which was served upon the defendants' correspondent attorneys on that same day. The summary judgment application was not opposed. A notice indicating that the summary judgment matter was set down on 8 September 2022 was served upon the defendants' correspondent attorneys on 24 August 2022.

[6] On 8 September 2022, the day of the hearing of the summary judgment application, counsel appeared on behalf of the defendants, and moved an application for postponement. He handed up an affidavit in which the postponement was sought, as well as a notice of intention to oppose the summary judgment. Upon inquiry it transpired from the plaintiff's counsel that the postponement application had been handed up to her on the morning of the hearing. Her instructions were to oppose the application for postponement, although she stressed that her client had not had opportunity to deliver an opposing affidavit. The notice of intention to oppose does not contain a court stamp indicating when it was filed, or any indication of when it was served.

[7] The affidavit supporting the postponement is deposed by an attorney representing the defendants, with no confirmatory affidavit from either of the defendants. It itemized some issues which are said to have been prevalent from the inception of the lease agreement between the parties, and which are said to

constitute a 'substantial counterclaim against the plaintiff, though it was stated that the counterclaim was yet to be fully formulated by counsel. The affidavit also stated that the defendants intend to amend their plea to include the counterclaim. It further stated that the defendants have always intended to defend the matter, and will file a substantive affidavit opposing the summary judgment.

[8] As for the reasons for the delay in opposing the summary judgment, the affidavit states that *"upon the breakdown of settlement negotiations between the parties the Defendants were only in a position to furnish our offices with the necessary financial instructions on or about the 7th of September 2022. Whereinafter (sic) counsel was briefed to attend the postponement of the matter"*. In addition, it is stated that *"Mr Mayet the attorney vested with the matter, had to travel to Abu Dhabi on an emergency basis and was unable to consult with the Defendants and/or counsel"*.

[9] There is no indication in the postponement affidavit of when the breakdown of settlement negotiations is supposed to have occurred; and whether the parties' understanding of the settlement negotiations was that they would stay these proceedings. In fact, the indications are to the contrary, given that the plaintiff has persisted with these proceedings. There is also no reason given for why, if the issues that are now said to constitute 'a substantial counterclaim' have been prevalent from the inception of the lease, the counterclaim itself was not instituted sooner; or why the summary judgment was not opposed in time. There is no indication of when the defendants found themselves unable to give financial instructions; or what efforts they made with regards to obtaining legal representation in time. I consider that to be relevant in light of the fact that the defendants did after all file a plea on or about 18 July 2022. As I have already mentioned, no confirmatory affidavit accompanied the postponement application to confirm the apparent difficulties faced by the defendants. There is also no indication given of when their attorney Mr Mayet was required to travel to Abu Dhabi on an emergency basis, and to what extent that had

an effect on the delay in bringing the opposition to the summary judgment. This is so especially now that the affidavit is deposed by one Nadeem Khan who is in the employment of the same law firm, and appears to represent the defendants in Mr Mayet's absence. There is also no condonation application for the late filing of the notice of intention to oppose the summary judgment. Neither was there any indication in the postponement application of when the answering affidavit in the summary judgment was to be delivered.

[10] The application was unsatisfactory and deficient in all the respects highlighted immediately above. I posed most of these questions to the counsel who appeared on behalf of the defendants to move the postponement, and he could not give me any answers. I pause to mention that on the day of the hearing I adjourned the proceedings so that I could read the affidavit that was handed up to me, and it was upon my return that I posed my questions.

[11] The result was that the defendants failed to place a full account before the Court regarding their failure to comply with the court rules, or to establish good cause for the granting of the postponement. A postponement is not merely there for the asking. It is an indulgence sought by an applicant, in respect of which the Court retains a discretion to grant or refuse. An applicant seeking it must furnish a full and satisfactory explanation of the circumstances that gave rise to the application.¹ It is in this regard that the defendants' application was lacking. The distinct impression created by the defendants' belated application for postponement was that it was a delaying tactic.

[12] As regards any potential prejudice that the defendants might suffer as a result of the dismissal of the postponement application, the merits of the summary judgment bear scrutiny.

¹ See Erasmus, *Superior Court Practice*, Vol 2, pp DI-552A.

[13] The defendants' plea amounts to a bare denial of their indebtedness. No issue is raised for trial, and no ground for defence is disclosed. Accordingly, the plaintiff was entitled to the summary judgment in respect of the arrear rentals and ejectment.

[14] As regards the damages claimed, paragraph 6 of the order granted permits the plaintiff to pursue that claim separately and for the defendants to defend it. In my observation, the matters itemized in the affidavit supporting the defendants' postponement application which are said to constitute a basis for a counterclaim may be properly dealt with in those proceedings. This is the only respect in which the defendants have given an indication of a possible claim against the plaintiff. There is otherwise no defence - *bona fide* or otherwise - disclosed regarding the plaintiffs claim for ejectment and arrear rentals. To the extent that any prejudice may be anticipated by the defendants or indeed by the plaintiff with regard to the damages claim, paragraph 6 of the order sufficiently caters therefor.

[15] There was otherwise no basis placed before the Court for the defendants to escape the summary judgment sought by the plaintiff. Put differently, the plaintiff satisfied the requirements for obtaining summary judgment. As a result, the balance of convenience did not favour granting the postponement application. As the Supreme Court of Appeal² has observed, the summary judgment procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. It is only drastic for a defendant who has no defence. That observation is apt for this case.

[16] In the circumstances, the following order was granted on 8 September 2022:

1. The defendants' application for postponement is dismissed;
2. Cancellation of the lease concluded between the plaintiff and first

² *Joob Joob Investments (Pty) Ltd Stocks Mavundla Zek Joint Venture* (161/08) [2009] ZASCA 23;

defendant on or about 28 October 2020 is hereby confirmed with effect from 1 November 2021;

3. An order of ejectment is made against the defendant and all those who occupy warehouses 7[...], 7[...] and 8[...] P[...] Industrial Park, Comer M[...] Drive and R[...] Road, M[...] G[...], Cape Town, through the first defendant from the said premises.

4. The first and second defendants, jointly and severally, the one paying the other to be absolved shall make payment to the plaintiff in the sum of R9,236, 245.53;

5. The first and second defendants, jointly and severally, the one paying the other to be absolved, shall make payment of interest on the aforesaid amount of R9,236, 245.53 at the rate of 2% per month from 2 November 2021 to date of payment;

6. The first and second defendants, jointly and severally, the one paying the other to be absolved, shall pay the costs of suit to date hereof and the costs of the summary judgment application on the attorney and client scale.

7. The plaintiff is entitled to pursue its claim for damages arising from the cancellation of the lease from 2 November 2021 and the defendants are granted leave to defend such claim.

N MANGCU-LOCKWOOD
Judge of the High Court